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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 777

DUKE POWER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10-23) is reported at 366 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1966. The petition for a writ of certiorari was filed on November 17, 1966. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to compensation for the loss of water power on a nonnavigable tributary of a navigable river, attributable to a federal dam project in the navigable river.

STATEMENT

The United States constructed the Hartwell Dam as a flood-control measure on the navigable Savannah River, about five miles below the confluence of the Seneca and Tugaloo Rivers. Petitioner's dam and hydroelectric facilities, constructed between 1896 and 1898, are located at a nonnavigable point on the Seneca, about eight miles above its juncture with the Tugaloo. The Hartwell Dam raised the level of the Savannah and eliminated the flow and fall of the Seneca at the point where it was being used by petitioner for the production of hydroelectric power. It also flooded some of petitioner's fast land. A commission appointed pursuant to Rule 71A, F.R.Civ.P., awarded $37,000 for the flooding of the fast land and approximately $500,000 as compensation for the loss of petitioner's hydroelectric power. The district court affirmed the commission's findings, but the court of appeals reversed the district court on the ground that (Pet. App. 19):

> * * * the Seneca River is subject to the control of the Government as a tributary, though nonnavigable, of the navigable Savannah, and * * * the United States took nothing from Duke when it abolished Duke's continued adaptation of the Seneca waters for the generation of electricity.

ARGUMENT

1. The court below properly concluded that the building of the Hartwell Dam as a flood-control measure on the navigable Savannah River was an exercise of the government's plenary power under the Com-

merce Clause to appropriate the flow of navigable waters. This Court observed in *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 233, that in so doing the government "is exercising established prerogatives and is beholden to no one." Riparian owners on nonnavigable tributaries have no right to be compensated for damage caused by reduced flow in the tributaries as a result of such an appropriation. On facts strikingly similar to those involved here, this Court rejected a compensation claim in *United States* v. *Willow River Co.*, 324 U.S. 499, holding that "a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation." 324 U.S. at 509. That principle applies here.

2. It is true, as the court below observed, that the holding in this case appears to conflict with *United States* v. *Cress*, 243 U.S. 316, 329–330, where compensation was required on a showing that the erection of a federal dam on a navigable river had the necessary effect of destroying the power head of a private mill dam on a nonnavigable tributary. But in the *Willow River* decision, 324 U.S. at 507, this Court reaffirmed its observation in *United States* v. *Chicago M., St. P. & P.R. Co.*, 312 U.S. 592, 597, that the *Cress* decision was to "be confined to the facts there disclosed." And four members of this Court observed (in dissent) in *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 813–814, that the *Cress* case "had been largely destroyed by intervening decisions." The court below correctly concluded, therefore, that *Cress* "has been so severely pared as a precedent on the present point"

that it could not be allowed "to prevail here" (Pet. App. 23). We have, on various occasions, urged the Court expressly to overrule *Cress*, and the Court may deem it appropriate to review this case in order to do so explicitly. But we submit that the course of decisions heretofore has so plainly deprived *Cress* of vitality that there is no longer any real need for a death-blow.

3. The decision of a majority of this Court in *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, did not award compensation for the kind of injury involved here and in *Cress*. In the *Kansas City* case, a federal dam on a navigable river had caused damage to agricultural lands riparian to a nonnavigable tributry. By raising the level of the nonnavigable stream above its high water mark, the construction of the dam had caused undersurface invasions of the land which were "substantially as destructive as if the land had been submerged." 339 U.S. at 802–803. This Court distinguished cases like *Willow River* (which involved merely the "reduction of a power head" in a nonnavigable tributary [339 U.S. at 807]) from the *Kansas City* situation, where "the land was permanently invaded by the percolation of the waters from both the river and its tributary." 339 U.S. at 810. In short, the Court held in *Kansas City* that there was no difference for Fifth Amendment purposes "[w]hether the prevention of the use of the land for agricultural purposes was due to its invasion by water from above or from below * * *." *Ibid.* This case, unlike *Kansas City*, involves no flooding of land from either above or below; it turns only on whether there is a right to

retain a certain power head in a nonnavigable tributary which empties into a navigable river.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
ROGER P. MARQUIS,
HOWARD O. SIGMOND,
EDMUND B. CLARK,
Attorneys.

DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966